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Nos. 91-744 and 91-902

Supreme Court, U.S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1991

Planned Parenthood of Southeastern Pennsylvania, *et al.*,
Petitioners and Cross-Respondents,

v.

Robert P. Casey, *et al.*,
Respondents and Cross-Petitioners.

On writs of certiorari to the United States Court of Appeals for the Third Circuit

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Brief *Amicus Curiae* of the National Legal Foundation in support of Respondents and Cross-Petitioners

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in upholding the constitutionality of the following provisions of the Pennsylvania Abortion Control Act:

   a. 18 Pa. Cons. Stat. Ann. Sec. 3203 (definition of medical emergency)

   b. 18 Pa. Cons. Stat. Ann. Sec. 3205 (informed consent)

   c. 18 Pa. Cons. Stat. Ann. Sec. 3206 (parental consent)

   d. 18 Pa. Cons. Stat. Ann. Secs. 3207, 3214 (reporting requirements)?

2. Did the Court of Appeals err in holding 18 Pa. Cons. Stat. Ann. Sec. 3209 (spousal notice) unconstitutional?

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INTEREST OF AMICUS CURIAE

The National Legal Foundation is constituted for the purpose of advocacy in support of First Amendment freedoms and other inalienable rights. While typically this involves the Foundation on the side of individual plaintiffs, in this instance, it argues in support of legitimate and historically acceptable governmental efforts to protect the lives of unborn children. The Court's decision in this case will dramatically affect the ability of our elected state officials to extend the guarantees of life and

liberty found in the Declaration of Independence to all men and women regardless of their vulnerability or stage in life. When such protection is denied to the unborn, the door is opened for arbitrary withdrawal of such guarantees to all men and women.

The National Legal Foundation is a non-profit corporation organized to defend, restore, and preserve constitutional liberties, family rights and other inalienable freedoms.

Counsel of record for *Amicus Curiae*, Robert K. Skolrood is Executive Director and Tracy Louise Winn is Staff Attorney for The National Legal Foundation. Counsel for *Amicus Curiae* specialize in constitutional litigation and have participated in significant cases relating to First Amendment and other constitutional freedoms.

The National Legal Foundation believes the experience of its attorneys will be of assistance to the Court in evaluating this case.

The parties have consented to the filing of this brief; their letters to that effect have been filed separately in this Court.

SUMMARY OF ARGUMENT

As the provisions of Pennsylvania's Abortion Control Act 18 Pa. Cons. Stat Sec 3201 - 3220 (1990) (289a - 304a),[1] have not been allowed to go into effect, Petitioners are restricted to a facial challenge to the constitutionality of the Act. As such, Petitioners have not met the heavy burden of demonstrating that "no set of circumstances exists under which the Act would be valid." *Webster v. Reproductive Health Services,* 492 U.S. 490, 524 (1989) (O'Connor, J., concurring) (quoting *United States v. Salerno,* 481 U.S. 739, 745 (1987).

It is insufficient under this standard of proof for Petitioners to assault the Court with a "worst-case analysis that may never occur," *Ohio v. Akron Center for Reproductive Health,* 110 S.Ct. 2972, 2981 (1990) and to argue that these scenarios may render the Act's application unconstitutional and then maintain that they have met their burden.

Moreover, since the State has proven that the Act *can* be applied constitutionally in a wide variety of circumstances, Petitioners, by definition, have not met their burden. Consequently, their facial challenge must fail.

It is important to note that in mounting this facial challenge, the Petitioners' heavy reliance upon the findings of the District Court was misguided. Many of the findings of fact, as they pertained to the reasonableness of the statute, were properly a matter for the Pennsylvania legislature and not the court.

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1. For ease of reference, citations are to the Appendix filed with the Petition for Writ of Certiorari in No 91-744 as "___a." Citations to the Joint Appendix are as "J.A. ___." Citations to the Appendix below are as "App. ___."

ARGUMENT

I. Petitioners Have Failed To Meet Their Heavy Burden In Attacking The Statute "On Its Face."

The Petitioners, five abortion clinics and one physician, raise a facial constitutional challenge to certain 1988 and 1989 amendments to the Pennsylvania Abortion Control Act of 1982 (the Act), see 18 Pa. Cons. Stat. Sections 3201-3220 (1983 & Supp. 1991).

Such an undertaking on the part of Petitioners requires a review of the proper standards for a challenge asserting that provisions of a statute are unconstitutional "on their face."

This Court has elucidated the burden on a challenger mounting a facial attack to a legislative act by stating:

> A facial challenge to a legislative act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that *no set of circumstances exists* under which the act would be valid. The fact that the [relevant statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment.

Webster v. Reproductive Health Services, 492 U.S. 490, 524 (1989) (O'Connor, J., concurring) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)); See also *Ohio v. Akron Center for Reproductive Health*, 110 S.Ct. at 2972, 2980 - 81 (1990) (emphasis added).

Recently, this Court has gone further to state that extreme scenarios are not to be relied upon as grounds for invalidating a state statute. Justice O'Connor in *Ohio v. Akron Center for*

Reproductive Health, 110 S.Ct. 2972, 2981 (1990) (O'Connor, J., concurring) stated, "The Court of Appeals should not have invalidated the Ohio statute on a facial challenge based upon a worst-case analysis that may never occur." Justice O'Connor was clearly drawing upon the wisdom of earlier pronouncements of this Court where it has been said:

> Very significant is the incontrovertible proposition that it 'would indeed be undesirable for this Court to consider *every conceivable situation* which might possibly arise in the application of complex and comprehensive legislation.' The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to *hypothetical cases thus imagined*. The Court further pointed to the fact that a limiting construction could be given to the statute by the court responsible for its construction if an application of doubtful constitutionality were in fact concretely presented. We might add that application of this rule frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy.

United States v. Raines, 362 U.S. 17, 21-22 (1960) (quoting *Barrows v. Jackson* 346 U.S. 249, 256 (emphasis added).

Indeed, Petitioners cloud the true issues by distracting the Court with a "worst-case" analysis of the Act's application "that may never occur." In so doing, they have not met their burden constitutionally. Rather, they must establish that "no set of circumstances exists under which the act would be valid." *Ohio*, 110 S.Ct. at 2980-81 (quoting *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (O'Connor, J., concurring)).

Petitioners fail to meet that challenge. Since this is the standard that Petitioners are required to meet, it stands to reason that if the State has demonstrated instances where the

law would be constitutional, Petitioners would be indeed *unable* to meet their burden.

Admittedly, the Court has indicated how heavy a burden this is for Petitioners in *United States v. Salerno*, 481 U.S. 739, 745 (1987) where the court said: "We think Respondents have *failed to shoulder their heavy burden* to demonstrate that the Act is 'facially' unconstitutional," yet the provisions must stand if they can be shown to be constitutional in some circumstances.

II. The State Has Demonstrated That The Provisions Of The Act Bear A Rational Relationship To A Legitimate State Interest Or In The Alternative Are "Reasonably Related" To A Compelling State Interest.

In its decision below, the Court of Appeals applied the undue burden standard in analyzing the constitutionality of the Pennsylvania Abortion Control Act. The court took this standard from the plurality opinions in *Webster*, *Hodgson v. Minnesota*, 110 S.Ct. 2926 (1990), and *Ohio*.

In *Webster*, four members of the Court, indicated that they believed that the right of privacy as it relates to abortion implicates a "liberty interest protected by the Due Process Clause" and that laws regulating abortion are subject only to a "rational basis" test. 492 U.S. at 520. Justice O'Connor, however, refused to join that portion of Justice Rehnquist's opinion. Instead, she stated that she continues to adhere to the "undue burden" standard expressed in her dissenting views in *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 452 (1983) (O'Connor J., dissenting) and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting) because the majority in those cases "had distorted and misapplied its own standard for evaluating state regulation of abortion which the Court had

applied with fair consistency in the past: that, previability, 'a regulation imposed on a lawful abortion is not unconstitutional unless it unduly burdens the right to seek an abortion,'" *Webster*, 492 U.S. at 530. (O'Connor, J., concurring) (quoting *Akron*, 462 U.S. at 453 (O'Connor, J., dissenting)).

Based on these views, Justice O'Connor provided the crucial fifth vote to uphold the Missouri viability testing requirement because it "[did] not impose an undue burden on a woman's abortion decision." *Id.* Again, in *Hodgson* Justice O'Connor provided the fifth vote in striking down the two-parent notice requirement absent a bypass procedure. She did so on her understanding that "[i]f the particular regulation does not 'unduly burde[n]' the fundamental right, . . . then our evaluation of that regulation is limited to our determination that the regulation rationally relates to a legitimate state purpose." *Hodgson*, 110 S.Ct. at 2949-50 (O'Connor, J., concurring) (quoting *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 453 (1983) (O'Connor, J., dissenting)).

In *Thornburgh*, Justice O'Connor set forth her understanding of the "undue burden" standard under which abortion laws should be reviewed:

> Under this Court's fundamental-rights jurisprudence, judicial scrutiny of state regulation of abortion should be limited to whether the state law bears a rational relationship to legitimate purposes such as the advancement of [the state's] compelling interests, with heightened scrutiny reserved for instances in which the state has imposed an "undue burden" on the abortion decision. An undue burden will generally be found "in situations involving absolute obstacles or severe limitations on the abortion decision," not wherever a state regulation "may 'inhibit' abortions to some degree." And if a state law does interfere with the abortion decision to an extent that is unduly burdensome, so that it becomes "necessary to apply an exacting standard of

> review," the possibility remains that the statute will withstand the stricter scrutiny.

Thornburgh, 476 U.S. at 828 (O'Connor, J., dissenting) (citations omitted).

Under the undue burden standard, a court must first determine whether the challenged provision involves "absolute obstacles or severe limitations on the abortion decision." *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting). If it does not, the regulation must be upheld if it "bears a rational relationship to legitimate [state] purposes." *Id.*

Under this part of the test, it is Petitioners' burden to prove that the statute imposes an absolute obstacle or severely limits the abortion decision. If they do not meet this burden the commonwealth need only show that the provision is *rationally related* to a legitimate state interest.

Even where a statute does involve an undue burden, it may be upheld if it is "reasonably related" to a compelling state interest. *Id.* If Petitioners can meet their burden of proving that the statute imposes an undue burden, the burden shifts to the Commonwealth to show that the provision *reasonably furthers* a compelling state interest.

What follows is a section by section analysis of the provisions of the Act that will demonstrate that all the provisions bear a rational relationship to a legitimate state interest or in the alternative, are reasonably related to a compelling state interest.

A. The State Demonstrated That The Term "Medical Emergency," When Properly Construed, Is Not Unduly Burdensome.

Petitioners have claimed that the definition of "medical emergency" is unduly burdensome as it pertains to the various provisions of the Act because it is narrower than other

definitions of medical emergency found in some Pennsylvania laws. Section 3203 of the Act defines "medical emergency" to mean:

> That condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of major bodily function.

18 Pa. Cons. Stat. Ann. Section. 3203 (Supp. 1991).

In reviewing Petitioners' challenge to the medical emergency language, it is important to note that the Act does not prohibit abortions, absent a medical emergency, as Petitioners imply. Rather, the Act simply regulates the general practice of abortion in various ways and then exempts the physician from complying with those regulations when he judges that a medical emergency exists.

The District Court found three conditions: preeclampsia, inevitable abortion and premature ruptured membrane, to be outside the definition of a medical emergency. Cf. *Planned Parenthood v. Casey*, 744 F. Supp. 1323 at 1378 (E.D. Pa. 1990). By so doing, the District Court Judge ignored the rules of statutory construction.

The Court of Appeals rightly concluded that the issue was a matter of statutory interpretation to be governed by Pennsylvania law stating:

> It is thus apparent that our initial issue for resolution is one of statutory interpretation and is governed by Pennsylvania law. There is no helpful Pennsylvania case law construing the medical emergency provision of the Act. There are, however, Pennsylvania cases indicating that statutes of the Commonwealth should be construed to sustain their constitutionality. See *Commonwealth v.*

Blystone, 549 A.2d 81, 87 (Pa. 1988) ("Any doubts are to be resolved in favor of sustaining the legislation.") *Hughes v. Commonwealth Dept. of Transportation*, 523 A.2d 747, 750-751 (Pa. 1987) ("We must presume that an Act of the legislature is intended to be constitutional and wherever a legislative act can be preserved from unconstitutionality it must be preserved."); see also *Webster*, 492 U.S. at 514 (statutes should be interpreted to avoid constitutional difficulty); *Frisby v. Schultz*, 487 U.S. 474, 483 (1988) (same).

Planned Parenthood of Southeastern Pennsylvania v. Casey, No. 90-1662, slip op. at 37 (3d Cir. Oct. 21, 1991).

The State demonstrated that it was possible to construe the term "medical emergency" in a manner that would include these conditions thereby sustaining their constitutionality.[2]

The Court of Appeals agreed that the conditions did indeed fall within the definition of a medical emergency and so the Petitioners' challenge must fail.

Additionally, Petitioners are not required to know precisely whether a particular condition *will result* in substantial and irreversible impairment of a major bodily function. Rather, they need only determine, in their good faith clinical judgment, that a serious *risk* of such impairment exists in order to avail themselves of the medical emergency exception. These are medical "judgment[s] that physicians are obviously called upon to make routinely whenever surgery is considered." *Doe v. Bolton*, 410 U.S. 179, 192 (1973).

Since Petitioners are exempt from liability whenever they have acted upon their "good faith clinical judgment," there is no possibility that they will be found to have violated any provision of the Act due to a medical emergency unless they, in bad faith, determined that such an emergency existed. The definition of

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2. *See* App. 887-897 (Testimony of Dr. Bowes, State's Expert Witness).

medical emergency clearly is not unconstitutionally vague for purposes of this facial challenge and Petitioners' attempts to have it struck on that ground must be rejected.

B. The Informed Consent Provision Bears A Rational Relationship To A Legitimate State Interest.

Absent a medical emergency, Section 3205 of the Act requires that a physician, prior to performing an abortion upon a woman, obtain her voluntary and informed consent to the performance of the abortion. Consent is only considered to be voluntary and informed if the woman is informed of the minimal information set forth in the Act at least 24 hours prior to the abortion.[3]

Section 3205 does not prevent any woman from obtaining an abortion -- it simply requires that she be provided with certain information. Thus, it does not impose an "absolute obstacle or severe limitation on the abortion decision." Indeed, the informed consent requirement enhances rather than burdens a woman's decision-making ability by requiring that she be provided with a minimum amount of information (which is accurate and objective) which may be relevant to her abortion

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3. Section 3205 specifies that the physician or referring physician must inform the woman of the nature of the proposed procedure, risks and alternatives to the procedure, the probable gestational age of the unborn child, and any risks of carrying the child to term. A person to whom the responsibility has been delegated must also inform the woman: 1) medical assistance benefits may be available for prenatal care, childbirth and neonatal care; 2) that the Department of Health publishes printed materials describing the unborn child, listing agencies which offer alternatives to abortion, and explaining the availability of medical assistance benefits and that the woman has a right to review these materials if she chooses; and 3) that the father of the unborn child is liable to assist in support of their child even if he has offered to pay for an abortion.

decision.[4] Therefore, Section 3205 does not constitute an "undue burden" on abortion.

Since it does not constitute an undue burden, it must be upheld in that it is rationally related to a legitimate state interest. The Commonwealth seeks to promote several legitimate interests in requiring that this information be provided to pregnant women considering abortion. The Commonwealth has a legitimate interest in protecting pregnant women by ensuring that they are provided with information sufficient to enable them to make an informed choice regarding abortions.

Since a woman has a constitutional right to carry her unborn child to term, *Maher v. Roe*, 432 U.S. 464, 472 n.7 (1977), the Commonwealth also has an interest in ensuring that she does not relinquish that right without being fully informed. In addition, because abortion is unlike all other medical procedures in that it involves purposeful termination of a human life, the Commonwealth has an interest in ensuring that the decision to

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4. Dr. Rue testified that such information provided to the woman would impact her decision: Research by Mary Cunningham Agee indicated [when] she asked the question of women that had obtained abortions, if you had known that there were *other options* for you, *would you have elected an abortion*? And 90 percent said they would *not* have. App. 797. (emphasis added).
Moreover, Dr. Bowes related the following story.

> Q. Now, when you counsel women regarding informed consent, do you offer them the opportunity to see pictures regarding fetal development?
> A. Yes.
> Q. And in your experience have women wanted to see those pictures?
> A. Yes, it often is helpful in really making more clear than just a simple description of fetal development. If I can give you an example, we recently had a young woman with a fairly far advanced tumor, it's called a neuroectodermal tumor, which is a highly malignant tumor, was referred to us because she became pregnant during her --during her course of therapy. And the oncologist, the physicians who were caring for the patient and treating her, recommended that an abortion be done. And in counseling this patient, *she in fact wanted to see this material and elected to review it and, after doing so, was inclined and in fact chose to continue her pregnancy, in spite of considerable risks* to her. But all of the options were provided to her and she was very grateful for having that opportunity. So there are occasions when it can make a very big difference.

App. 912-913. (emphasis added).

abort should be made only after careful examination of all relevant or potentially relevant facts.

Section 3205 requires that the patient be given information on the nature of the procedure, risks, and alternatives. This information is routinely provided to patients considering surgery.[5] The right to informed consent is listed among the Patient's Bill of Rights in the Pennsylvania Code. 28 Pa. Code Section 553.12(8). As defined in the Health Care Services Malpractice Act, informed consent means "[t]hat prior to consent having been given, *the physician or podiatrist has informed the patient* of the nature of the proposed procedure or treatment and of those risks and alternatives to treatment or diagnosis that a reasonable patient would consider material to the decision whether or not to undergo treatment or diagnosis." 40 Pa. Stat. Ann. Section 1301.103 (emphasis added). Thus, the information required by Section 3205(1)(i) clearly relates to legitimate state interests and must be upheld.

In addition, information on the probable gestational age of the unborn child, Section 3205(1)(ii), is relevant not only to the risks associated with the performance of an abortion,[6] but also to

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5. Dr. Bowes testified: "Informed consent involves providing the patient with the - - with information about the risks of the condition that she happens to have at the time, the risk of the - - any medical or surgical procedures or therapies which are advised and the risks of alternative therapies or alternative procedures." App. 911.

6. Dr. Bowes testified that, because gestational age is directly related to abortion procedures and related risks, gestational information should be provided to the woman to enable her to give informed consent to the procedure:

> Q. Now in your experience or practice, do you have an opinion whether this requirement is beneficial to the woman?
>
> A. I think providing them the option of reviewing this material is beneficial and is part of a reasonable informed consent.
>
> Q. Now, why do you believe that?
>
> A. The period of gestation, the duration of gestation is important because it may affect how the patient views the, not only the risks which should be provided by the physician, but the development of the fetus. She may not be aware of the nature of fetal development and I think that's part

the psychological well-being of the woman.[7] As Justice O'Connor stated in *Thornburgh*, the information required by Section 3205(1)(iii) concerning the medical risks association with carrying a child to term "is the kind of balanced information I would have thought all could agree is relevant to a woman's informed consent." 476 U.S. at 830 (O'Connor, J., dissenting). Likewise, the information required by Section 3205(2) is "indisputably relevant in many cases [to the woman's decision] and would not appear to place a severe limitation on the abortion decision." *Thornburgh*, 476 U.S. at 831 (O'Connor, J., dissenting).

Since the information required by Section 3205 rationally relates to the state's legitimate interests, it is constitutional.

Petitioners' also claim that the 24-hour waiting period is unduly burdensome and unconstitutional and must be rejected. As Justice O'Connor stated in *Akron*:

> Although the waiting period may impose an additional cost on the abortion decision, this increased cost does not

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of her having a fully - - being able to make a fully informed decision about pregnancy termination. App. 912-913

7. Dr. Rue testified that such information would prevent psychological harm to the woman:

> A. My opinion that offering her the opportunity to be educated with respect to biological and scientific facts, this opportunity which is voluntary is certainly not going to provide the basis of any psychological trauma for a person considering an abortion.
>
> Q. Now what --
>
> A. If anything, I would say, if I could add, this will help her utilize her own personal values and that those values be informed and based upon some facts.
>
> If, after reviewing these materials, she were to believe that this is, indeed, a human fetus, then she may act and decide accordingly. If, on the other hand, after reviewing these materials she makes the decision that this is not a human fetus and proceeds, *I think she is preventing probable increased psychological damage from being misled or receiving fetal -- information* about fetal stages of development *after the abortion* at some later date or in the context of medical care in a wanted pregnancy later on. App. 795 (emphasis added).

> unduly burden the availability of abortions or impose an absolute obstacle to access to abortions. Further, the State is not required to 'fine-tune' its abortion statutes so as to minimize the costs of abortions. *H.L. v. Matheson*, 450 U.S. at 413.
>
> Assuming, *arguendo*, that any additional costs are such as to impose an undue burden on the abortion decision, the States' compelling interests in maternal physical and mental health and protection of fetal life clearly justify the waiting period. As we acknowledged in *Danforth*, 428 U.S. at 67, the decision to abort is 'a stressful one' and the waiting period reasonably relates to the State's interest in ensuring that a woman does not make this serious decision in undue haste. The decision also has grave consequences for the fetus, whose life the State has a compelling interest to protect and preserve . . . . The waiting period is surely a small cost to impose to ensure that the woman's decision is well considered in light of its certain and irreparable consequences on fetal life, and the possible effects on her own.

Akron, 462 U.S. at 473-474 (O'Connor, J., dissenting).

It is incongruous that that Petitioners would claim that the 24-hour waiting period is unduly burdensome in light of the fact that routine clinic practices require women to make two trips to the facility, one for the initial pregnancy test, and another for the abortion.[8] Therefore, Petitioners' challenge to this provision as being unduly burdensome must fail.

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8. Petitioners' witness testified:
   Q. In those instances would a woman have an abortion, if she chose to have an abortion on the same day as her initial pregnancy test?
   A. That would be *highly unusual* for someone *to have a pregnancy test positive for the first time and have an abortion on the same day.*
   Q. Under what circumstances might that occur?
   A. Probably the only time that it would occur is if she were at such a point in her pregnancy that a delay of even 24 hours meant that she would have to go – move from a 12-week to a 13, 14-week procedure or from that level to a second trimester procedure or perhaps not have the

C. The Parental Consent Provision Bears A Rational Relationship To Legitimate State Interest.

"[T]he relevant legal standards with respect to parental-consent requirements are not in dispute." *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 490 (1983). A state may require the consent of one parent as long as it provides "an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests." *Akron v. Akron Center for Reproductive Health*, 462 U.S. at 439-40 (1983).

Absent a medical emergency, Section 3206 of the Act prohibits the performance of an abortion on a minor unless the doctor has first obtained the informed parental consent of one of the minor's parents or has received court authorization to perform the abortion without parental consent. Thus, it broadly

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procedure at Women's Health Services at all, but she would have to be referred out of state. App. 699-700 (emphasis added).

Moreover, Dr. Bowes testified that other surgical procedures required lengthier waiting periods. For example, before a woman may be sterilized, she must consider her decision carefully for 30 days:

Q. With an informed consent do you consider a 24-hour waiting period to be beneficial?

A. Yes.

Q. Why is that?

A. I think that there is a very serious decision having to be made and the time to assimilate and digest, if you will, and consider the information that's been provided is beneficial to making that, to making an appropriate decision. One example of a similar type of situation when the – the Medicaid provisions require that women having sterilization procedures must wait 30 days from the time they have initially made a decision and been informed about it until they make a final decision before they can have a sterilization procedure. Now, that's a 30-day waiting period because it's felt to be an important – a decision of such importance. And that's regarded as being very straightforward now, we do that all the time.

Q. So do you consider time to be an important part of informed consent?

A. Yes, time to consider the facts.

Sterilization, under some circumstances, may be reversed. Abortion can never be reversed.

App. 920-921

complies with the standards set forth in *Ashcroft* and *Akron*. Moreover, Section 3206 undoubtedly furthers the Commonwealth's legitimate and compelling interests in protecting the rights of parents to direct the upbringing of their children and in protecting children who often lack the ability to make fully informed choices that take account of both immediate and long-range consequences of their decisions.

The Court's second concern regarding the narrowness of the medical emergency definition in the context of the parental consent provisions appears to have been needless. The Minnesota law upheld by the Supreme Court in *Hodgson* required parental notice prior to the performance of an abortion unless "[t]he attending physician certifies in the pregnant minor's medical record that the abortion is necessary to prevent the woman's death and there is insufficient time to provide the required notice." 110 S.Ct. at 2930. The emergency exception to notice upheld in *Hodgson* is far more narrow than that provided by Section 3206. Section 3206 is not limited to circumstances where an abortion is necessary to prevent death. Rather, it also exempts the physician from compliance where, in his or her good faith clinical judgment, "delay will create a serious *risk* of substantial and irreversible impairment of major bodily function." The physician is, therefore, provided much greater flexibility under the medical emergency exception contained in the Pennsylvania Act.

Petitioners continue to claim that the Act requires an in-person visit by parents to receive informed consent. As the District Court correctly held in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 686 F. Supp. 1089 (E.D. Pa. 1988), the Act does not require any such in-person visit. The court stated: "In order for consent to be 'informed' within the meaning of the Act, the physician must have *orally informed* the parent" according to the requirements of Section 3205. *Id.* at 1126 (emphasis supplied). "The Act is easily susceptible of an interpretation which would allow telephone consultation." *Id.* at

1127.[9] Moreover, since several days routinely pass between the time the minor contacts the clinic and the performance of the abortion, this Court observed that "[t]he clinic can easily mail a consent form to the parent" along with any information or printed materials which have been requested by the parent pursuant to Section 3205(2). *Id.*

Here, Petitioners state that they intend to require in-person visits and thereby impose more stringent requirements upon themselves than the Act itself requires.[10] They are free to do so. They may not, however, claim that such self-imposed requirements are mandated by the Act. Nor may they claim that the additional costs and delays which they anticipate due to this additional self-imposed requirement are caused by the Act and thus render it unconstitutional.

Petitioners' numerous other arguments concerning the alleged burdens of additional costs and delays necessitated by the parental consent requirement, in general, were also made in, and rejected by the court in, *Hodgson* and *Ohio*. For example, arguments regarding the increased health risks due to delays of a week or more were clearly important in causing Justice Marshall to dissent. *Hodgson*, 110 S.Ct. at 2954 (Marshall, J., dissenting). Yet these arguments failed to persuade the majority of the court that the challenged statutes were unconstitutional. *See, e.g.*,

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9. Petitioners' witness testified:
   Q. Is it possible to provide information over the telephone to a woman, and then follow it up with a face-to-face meeting another day?
   A. You mean to get a --
   Q. To obtain an informed consent?
   A. To obtain the informed consent. That should be possible...
App. 537

10. Petitioner's witness testified:
   If the act goes into effect we will require parental accompaniment to the clinic when the patient comes for her procedure. In difficult situations of which I anticipate there will be many, a visit at a separate time to the clinic with the minor would be possible, but parental presence at the clinic would be required absolutely. App. 90-91

Ohio, 110 S.Ct. at 2981 ("the mere possibility that the [judicial bypass] procedure may require up to twenty-two days [delay] in a rare case is plainly insufficient to invalidate the statute on its face.").

Finally, Petitioners' claim that the statute may not go into effect until the Commonwealth has established that its courts are prepared to implement it must be rejected. "Absent a demonstrated pattern of abuse or defiance, a state may expect that its judges will follow mandated procedural requirements." *Ohio*, 110 S.Ct. at 2981. Given that Petitioners have made a facial challenge to the Act, it is impossible for them to demonstrate any such pattern of abuse or defiance. This Court must assume that the Pennsylvania courts will follow the law. Thus, the Act should go into effect without further delay.

D. The Spousal Notice Provision Bears A Rational Relationship To A Legitimate State Interest

Section 3209(a) prohibits the performance of an abortion upon a married woman unless the physician has received a signed statement from the woman indicating that she has notified her spouse of her impending abortion. Spousal notice is not required if a medical emergency exists. 18 Pa. Cons. Stat. Ann. Section 3209(c). Nor is the verification of spousal notice required if the woman provides the physician with a signed statement certifying that at least one of the exceptions listed in subsection (b) applies to her. Those exceptions are: (1) her spouse is not the father of the child; (2) her spouse, after diligent effort, could not be located; (3) the pregnancy is the result of spousal sexual assault which has been reported to a law enforcement agency; and (4) the woman has reason to believe that giving notice to her spouse is likely to result in bodily injury to her.

Section 3209 is unlike the spousal *consent* statute struck in *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), which gave to the husband "a veto power exercisable for any reason whatsoever or for no reason at all." *Id.* at 71. Section 3209 does not provide any veto power. Regardless of her husband's wishes, the woman may obtain an abortion once she has notified her spouse. Thus, the spousal notice requirement does not impose an "absolute obstacle or severe limitation on the abortion decision." Accordingly, it does not constitute an "undue burden" on abortion.

Since the spousal notice requirement does not constitute an "undue burden" on abortion it is constitutional if it rationally relates to legitimate interests the Commonwealth seeks to protect. As set forth in Section 3209, the Commonwealth seeks to protect three substantial interests: (1) promoting the integrity of the marital relationship; (2) protecting a spouse's interest in having children within marriage; and (3) protecting a spouse's interests in protecting the prenatal life of his jointly-conceived child. These interests are clearly legitimate. "[S]tatutory regulation of domestic relations [is] one that has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). The state "prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effect upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution." *Maynard v. Hill*, 125 U.S. 190, 205 (1888). Thus, "a state may single out abortion for special legislative regulation because of its unique character and profound ramifications." *Scheinberg v. Smith*, 659 F.2d 476, 486 (5th Cir. 1981). The reproductive choice at stake in the context of abortion is different from all other reproductive choices in that it involves the purposeful termination of a jointly-conceived human life. Therefore, it is reasonable for the Commonwealth to treat it differently from those other reproductive choices.

E. The Reporting Requirements Bears A Rational Relationship To A Legitimate State Interest.

Section 3214(a) requires each abortion performed in the Commonwealth to be reported to the Department of Health on forms prescribed by it. Section 3214(h) requires each physician who provides medical care to a woman because of a complication resulting from abortion, to file the report with the Department of Health on forms prescribed by it. As this Court stated in *Casey*: "It is important to note at the outset that the information reported under Sections 3214(a) and 3214(h) will, by statute, remain confidential." 686 F. Supp. at 1130.

Neither Section 3214(a) nor Section 3214(h) imposes an absolute obstacle or severe limitation on the abortion decision. Indeed, since these sections require reports only after an abortion has already been performed, it is difficult to imagine how they would have any impact whatsoever on a woman's abortion decision. Accordingly, these provisions do not place an "undue burden" on abortion and must be upheld if they rationally relate to a legitimate interest of the Commonwealth.

The Commonwealth seeks to promote several legitimate interests in requiring that the information specified under Section 3214(a) be reported to the Department of Health. As set forth in the statute itself, the information required to be reported is sought "for the purpose of promotion of maternal health and life by adding to the sum of medical and public health knowledge through the compilation of relevant data, and to promote the Commonwealth's interests in protecting the unborn child." 18 Pa. Cons. Stat. Ann. Section 3214(a). In addition to these interests, the Commonwealth also seeks the information for legitimate demographic and public health reasons. As the U.S. Department of Health and Human Services recognizes:

> Data from reports of induced termination of pregnancy provide unique information on the characteristics of

> women having induced abortions. Uniform annual data of such quality are no where else available. Medical and health information is provided at various lengths of gestation and by the type of abortion procedure used. Information on the characteristics of the women is used to evaluate the impact that induced abortion has on the birthrate, teenage pregnancy, and out-of-wedlock births. The data also helps measure the role that induced abortion plays in birth prevention as compared with contraception.

Handbook on the Reporting of Induced Termination of Pregnancy, U.S. Department of Health and Human Services, pp. 2-3.

Finally, the Commonwealth has a legitimate interest in requiring reporting to aid in its enforcement of the Act.

The Federal Standard Report of Induced Termination of Pregnancy, a copy of which is appended to the Health and Human Services Handbook, was developed by the federal government to serve as a model for the states' use. Each item included on the report is evaluated thoroughly for its registration, statistical, health and research value. Thus, the information which is required to be reported on the federal form is clearly related to legitimate interests of the state. Pennsylvania's reporting form is nearly identical to the federal report, except insofar as it requires some additional information specifically required by the Act. To the extent that it is like the federal form, the Pennsylvania form is constitutional because it furthers the same legitimate interest.

This Court correctly held that several items required to be reported under Section 3214(a) were permissible because they reasonably relate to the Commonwealth's legitimate interest in protecting maternal health. *Casey*, 686 F. Supp. at 1130-31. Thus, only those items that were held to be invalid in *Casey* or that were added by the 1989 amendments and are presently enjoined, will be addressed below.

The referring physician is capable of giving informed consent required by Section 3205 and making the determination of gestational age required by Section 3210. As set forth above, his or her identity will not be made known to the public and will be kept confidential. In *Casey*, this Court upheld the requirement that the performing physician's identity be reported because "[t]he performing physician would be the person best able to answer questions which may arise as to the information contained on the report, or to provide missing information." 686 F. Supp. at 1130. Given the important role which the referring physician may play in conforming to the requirements of Section 3205 and Section 3210, his or her identity is likewise reasonably related to the State's legitimate interest in obtaining this type of follow-up information.

The requirement that the identity of the concurring physician and second physician required by Sections 3211(c)(2) and 3211(c)(5) be reported also rationally relates to the legitimate and compelling interests of the Commonwealth. These items apply only to reports of abortions performed on unborn children of 24 or more weeks gestation.[11]

Relatively few abortions are performed at this stage in pregnancy, and it can hardly be argued that in those few instances where such abortions are performed, the reporting requirement is unduly burdensome. The information required to be reported is of a type which would readily be available to the physician and would normally be documented in the patient's medical chart. In addition, the information on fetal weight must be reported on either a fetal death certificate if the baby died, or on a birth certificate, if the baby survives. Thus, the reporting of this information to the Department of Health on an individual-abortion reporting form can cause little additional burden to the

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11. We note that none of the Petitioners perform abortions on fetuses of 24 or more weeks gestation and, therefore, they lack standing to challenge Section 3214(a) as it relates to such abortions.

physician. Moreover, given the state's compelling interest in protecting the unborn child when viability is possible, reporting of the concurring physician, second physician, and the basis for performing an abortion pursuant to Section 3211(b)(1) all reasonably relate to the Commonwealth's compelling interest in protecting the unborn child.

Likewise, information on the basis for medical judgments with respect to the existence of a medical emergency are also relevant to the Commonwealth's interest in protecting maternal health. Such information will add to the sum of medical knowledge available with respect to high risk obstetrics and the necessity for abortion in such instances. It is also rationally related to the state's legitimate interest in enforcing the various provisions of the Act.

Information required to be reported in relation to the determination of gestational age is also rationally related to the state's legitimate interest in protecting maternal health and in protecting the unborn child. Performing an abortion without making the necessary accurate diagnosis of gestational age under such circumstances endangers not only the life of the unborn child but also the life of the pregnant patient.

Finally, the state has a compelling interest in requiring that spousal notice be given prior to an abortion. Thus, it is legitimate for the state to require that the reasons for failure to provide this notice be reported.

Section 3207(b) requires facilities at which abortions are performed to report: (1) the name and address of the facility; (2) the name and address of any parent, subsidiary or affiliated organization, corporation or association having contemporaneous commonality of ownership, beneficial interest, directorship or officership with any other facility. Section 3214(f) requires facilities to report the total number of abortions performed each quarter at the facility. These are hardly intrusive or burdensome requirements. They plainly promote the Commonwealth's interest in learning where abortions are

being performed in Pennsylvania, how many are performed at various facilities, and who owns the facilities so as to assure that appropriate practitioners are providing the services. Petitioners do not dispute this.

Petitioners object to the fact that the reports may be available for public inspection if the facilities receive public funds. On this point, Petitioners argue that the Commonwealth has no interest in disclosure and the facilities are subject to harassment because of the reports.

First, any argument that the operation of these sections is a direct link to actions of violence or harassment against the Petitioners' facilities is pure speculation. All that Petitioners can demonstrate is that they sometimes are the subjects of anti-abortion demonstrations and that this happens presently even without the operation of Sections 3207(b) and 3214(f). None of the information which would be made available (the identity of Petitioners and the numbers of abortions they perform) is of a nature which would incite more anti-abortion activity. For example, Petitioners all advertise in telephone directories and elsewhere that they provide abortion services.[12] Thus, anyone who wishes to know where such a facility is located need not go to the trouble of contacting the Department of Health for a Section 3207(b) report. The person need only check the telephone book.

Finally, despite Petitioners' low regard for the public's interest in knowing where and how its tax dollars are being spent, this is nevertheless an important state interest. The people, through their representatives, have determined that every "public record" of a government agency in this state "shall, at reasonable times, be open for examination and inspection by any citizen" of the Commonwealth. 65 Pa. Cons. Stat. Ann. Section 66.2. Public record is defined as "any account, voucher or contract dealing with the receipt or disbursement of funds by an

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12. *See* Court exhibits 8, 23, 20, and 35. App. 1305, 1358, 1415, and 1443.

agency. . . ." 65 Pa. Cons. Stat. Ann. Section 66.1. Thus, there is an important public interest in allowing the citizens of this state to see where and how public funds are spent and to patronize those facilities where abortions are not performed. These provisions rationally relate to that interest and are, therefore, constitutional.

III. The Reasonableness Of The Statutes Provision Are A Matter For The Legislature Not The Court.

After having demonstrated the reasonable nature of the provisions of the Act, we now turn to a consideration of the unreasonableness of the District Court is treatment of the Act. Petitioners and Cross-Respondents in this case begin with a misleading statement concerning the record below. Petitioners state:

> The District Court carefully documented the record evidence supporting each of its 387 findings of fact, none of which was reversed on appeal. Given the complete absence of "an extraordinary reason" to examine the District Court's findings, they must be accepted by this Court. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

Brief for Petitioners at 4.

Petitioners would lead this Court to believe that there is no reason to inquire into the District Court's findings and that they must be accepted in the absence of an "extraordinary reason." Why Petitioners would make such an argument -- in light of the fact that the Court of Appeals ignored certain findings of the District Judge as being irrelevant to the issues before the court, reached conclusions contrary to the District Court Judge or stated that some of his findings were without support in the

record[13] -- becomes clear when one considers how heavily Petitioners rely on such "findings" for argument in their brief.

Petitioners do nothing more than attempt to "lobby" the justices of this Court in an effort to persuade them to their political view of abortion.[14] The so-called "findings" of the District Court Judge serve to act as the ammunition for this tactic thereby transforming the chambers of this Court into a pseudo-Senate floor.

No one would deny that the debate about abortion has been a heated one for our nation. There are groups that stand diametrically opposed to one another on all issues. Yet when the Constitution has left with the Legislature the authority to regulate those areas, it is a matter for the those duly elected representatives of the people to decide the nature of any such rights and the contours of the law defining those rights. When the court under the guise of "fact finding" attempts to take issue or overrule the judgment of a particular legislature on the same point, it becomes clear that the court is attempting to sit as a super-legislature outside the constraints of the democratic process.

In the past, this Court has condemned such judicial interference. In *Powell v. Pennsylvania*, 127 U.S. 678, 686, (1888) the Court has said:

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13. An examination of the record will show that the Court of Appeals found some of the District Court's factual findings unsupported by the record (38a-40a, 79a-80a, 83a), or insufficient to establish an undue burden. (*e.g.* 46a, 49a, 51a, 53a-54a, 78a). The Respondents did challenge the District Court's factual findings on appeal. (*See* Brief for Appellant, at 15, 22).

14. Justice Scalia reminded the Court that it was needless "to prolong this Court's self-awarded sovereignty over a field where it has little proper business since the answers to most of the cruel questions posed are political and not juridical - a sovereignty which therefore quite properly, but to the great damage of the Court, makes it the object of the sort of organized public pressure that political institutions in a democracy ought to receive."

Webster v. Reproductive Health Services, 492 U.S. 490, 532. (1989) (Scalia, J., concurring).

> If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive . . ., their appeal must be to the Legislature, or to the ballot-box, not to the judiciary. The latter can not interfere without usurping powers committed to another department of government.

Recently, this Court has shown great respect for one of the other branches of our tripartite government with regard to any inquiry into the reasonableness of laws. In the past, this Court has corrected lower courts who have attempted to substitute their judgment for that of the legislature. In *Harris v. McRae*, 448 U.S. at 326, where the District Court after conducting a year-long evidentiary hearing regarding the public funding of abortion and reached conclusions contrary to the legislature, the U.S. Supreme Court said:

> In making an independent appraisal of the competing interests involved here, the District Court went beyond the judicial function. Such decisions are entrusted under the Constitution to Congress, not the courts. It is the role of the courts only to ensure that congressional decisions comport with the Constitution. . . . It is not the mission of this Court or any other to decide whether the balance of competing interests reflected in the statute is wise social policy. If that were our mission, not every Justice who has subscribed to the judgment of the Court today could have done so. But we cannot, in the name of the Constitution, overturn duly enacted statutes simply because they may be unwise, improvident, or out of harmony with a particular school of thought. Rather, when an issue involves policy choices as sensitive as those implicated [here] . . . the appropriate forum as their resolution in a democracy is the legislature.

Id. at 326 (citations and internal quotation marks omitted).

Again in *Vance v. Bradley*, 440 U.S. 93, 97 (1979) this Court has recognized that the "Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted."

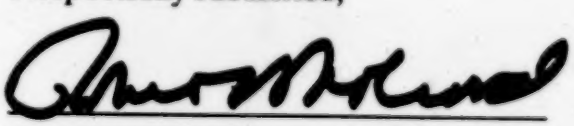
CONCLUSION

It is a heavy burden to attack a state statute as being unconstitutional on its face. Petitioners have failed to demonstrate that the Act is unconstitutional. Petitioners, rather than relying upon sound juridical arguments, have relied upon arguments that are more political in nature.

The legal standards in this area are clear. Justice O'Connor's undue burden standards are reasonable and workable. The state has demonstrated this quite aptly in the lower courts.

Accordingly, this Court should affirm the United States Third Circuit Court of Appeals opinion in upholding the constitutionality of Sections 3203 (medical emergency), 3205 (informed consent), 3206 (parental consent), and 3207, 3214 (reporting requirements) of the Pennsylvania Abortion Control Act and should reverse the decision with regard to Section 3209 (spousal notice).

Respectfully submitted,



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